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Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

JOSEPH MELFI,

Petitioner,

v.

WMC MORTGAGE CORPORATION, MORGAN STANLEY ABS CAPITAL 1 INC., DEUTSCHE BANK NATIONAL TRUST COMPANY, and WELLS FARGO BANK, N.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the First Circuit ignore the Federal Reserve Board's Regulation Z and create "interstitial law" in determining that a blank model form mortgage rescission notice "effectively" gave the final date for rescission?

(2) Does the First Circuit decision create a intolerable conflict between it and the Ninth and Fifth Circuits?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Joseph Melfi, Wells Fargo Bank, N.A., Deutsche Bank National Trust Company, N.A., as Trustee of Morgan Stanley ABS Capital I, Inc., Asset Backed Pass Through Certificates Series 2006-WMC2 Under the Pooling and Service Agreement Without Recourse.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the First Circuit was issued on June 11, 2009 and is reported at 568 F.3d 309 (1st Cir. 2009) (App. 1a-9a). The Decision of the United States District Court for the District of Rhode Island granting the Motion to Dismiss filed by Wells Fargo Bank, N.A., Deutsche Bank National Trust Company, N.A., as Trustee of Morgan Stanley ABS Capital I, Inc., Asset Backed Pass Through Certificates Series 2006-WMC2 Under the Pooling and Service Agreement Without Recourse ("Respondents"), was issued on January 9, 2009 and is reported at *Melfi v. WMC Mortgage Corp.*, 2009 WL 64338 (D.R.I. Jan. 9, 2009). (App. 10a-16a). That Decision adopted the Report and Recommendation of a Magistrate Judge dated November 19, 2008. (App. 17a-35a).

The First Circuit denied Petitioner's Petition for Rehearing *En Banc* or, in the Alternative, for Panel Rehearing on July 22, 2009. (App. 36a-37a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the First Circuit was issued on June 12, 2009 (hereafter, the "Decision") and a Petition for Rehearing *En Banc* or, in the Alternative, for Panel Rehearing was denied on July 22, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE, REGULATIONS, AND STAFF COMMENTARY INVOLVED

The relevant portions of section 1635 of the Truth in Lending Act (TILA), provide:

(a) Disclosure of obligor's right to rescind

> [When] a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, *in accordance with regulations of the Board,*[1] of his intention to do so. The creditor shall clearly and conspicuously disclose, *in accordance with regulations of the Board*, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, *in accordance with regulations of the Board*, appropriate forms for the obligor to exercise

1. All emphasis within quotations are provided, unless otherwise noted.

his right to rescind any transaction subject to this section.

* * *

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor . . .

* * *

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, *that was properly completed by the creditor, and otherwise complied* with all other requirements of this section regarding notice.

The Federal Reserve Board's implementing regulations, known as Regulation Z, provide at 12 C.F.R. § 226.23:

> (a)(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. *If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first . . .*
>
> (b)(1) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:
>
> (I) The retention or acquisition of a security interest in the consumer's principal dwelling.
>
> (ii) The consumer's right to rescind the transaction.
>
> (iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) *The date the rescission period expires.*

The Federal Reserve Board's Official Staff Commentary, located at 12 C.F.R. § 226.23(b)(3), state that a rescission notice "*must* include all of the information outlined in Section 226.23(b)(1)(i) through (v)."

STATEMENT

This Petition implores the Court to review the First Circuit Opinion, which declined to apply the Federal Reserve Board's Rules and Official Staff Commentary to a mortgage rescission notice. Instead, it created a new, subjective test in direct conflict with at least two other circuits, enunciated as whether such a notice "*effectively*" gives "notice as to the final date for rescission." (App. 7a)

Mr. Melfi refinanced his home mortgage loan on Friday, April 7, 2006 with WMC Mortgage Corporation. (App. 24a) At the closing he received a "model form" notice of his right to cancel the transaction (the "Notice"), but the lines on the Notice were left blank by the lender.[2] (App. 4a - 5a) TILA requires that a

2. In the upper right hand corner of the Notice (but outside the boxed area in the center of the form marked "HOW TO CANCEL") a date appears but, as the Decision noted, it was not designated as the closing date. (App. 4a)

consumer's right to rescind such a transaction be "clearly and conspicuously" disclosed "in accordance with regulations of the Board."[3] Regulation Z mandates that a rescission notice include the "date the rescission period expires."[4] The Board's Official Staff Commentary states that "[t]he notice *must* include all of the information outlined in Section 226.23(b)(1)(i) through (v)."[5] If the required notices are not properly given, the rescission period automatically extends to three years.[6]

The United States District Court dismissed Mr. Melfi's rescission case, stating that:

> . . . the First Circuit has rejected the strict liability view for TILA violations, citing TILA amendments which were intended to "provide higher tolerance levels for what [Congress] viewed as honest mistakes in carrying out disclosure obligations." In this case, the Notice was clear and conspicuous despite the information omitted, because the hypothetical average consumer would not have been confused by the Notice. The Notice, therefore, did not violate TILA. (internal citations omitted)

(App. 18a-19a).

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3. 15 U.S.C. § 1635(a).

4. 12 C.F.R. 226.23(b)(1)(v).

5. 12 C.F.R. § 226. 23(b)(3).

6. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).

Mr. Melfi appealed to the First Circuit, arguing that a blank model form could not, as a matter of law, fulfill the express requirement of Regulation Z that a rescission notice include the "date the rescission period expires." The First Circuit upheld the District Court, stating that:

> . . . technical deficiencies do not matter if the borrower receives a notice that *effectively* gives him notice as to the final date for rescission and has the three full days to act. Our test is whether any reasonable person, in reading the form provided in this case, would so understand it. Here, the omitted dates made no difference.

(Pet. App. 7a).

Mr. Melfi's home has been noticed for foreclosure sale on November 4, 2009 and an Application for Stay of the First Circuit's Mandate was filed simultaneously with this *petition for certiorari*.

REASONS FOR GRANTING THE PETITION

A. The Fifth and Ninth Circuits Have Expressly Held That Omitting the Date the Rescission Period Expires Is a Violation of TILA

The Fifth and Ninth Circuits have expressly held that omitting the date on which the rescission period expires is a violation of TILA. The Ninth Circuit, in *Semar v. Platte Valley Fed. Sav. & Loan Ass'n.*, 791 F.2d 699,704 (9th Cir. 1986), held that a "failure to fill in the expiration date of the rescission form is a violation of the TILA." *Id.* at 704, citing to *Williamson v. Lafferty*, 698 F. 2d 767 (5th Cir. 1983). In *Williamson*, the Fifth Circuit held that the "applicable regulation makes clear that failure to fill in the expiration date of the rescission form is a violation of the TILA." *Id.* at 768.

In addition to the Ninth Circuit and Fifth Circuit, numerous other state and federal courts have followed the rationale of *Semar* and *Lafferty*, holding that a lender's failure to provide the date the rescission period ends is a *per se* violation of TILA.[7] Indeed, the Eastern

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7. *See, Johnson v. Thomas*, 342 Ill. App. 3d 382, 794 N.E.2d 919, 931(Ill. App. Ct. 2003)("[F]ailure to fill in the expiration date on the rescission form violated the TILA and Regulation Z."); (*Reynolds v. D & N Bank*, 792 F.Supp. 1035, 1038 (E.D.Mich.1992) ("providing only the date of closing does not comply with the regulation, particularly when the notice provides for the [rescission] date to be entered on a separate

(Cont'd)

District of Pennsylvania stated in 2007 that "we were unable to find, nor did Chase cite, a single case excusing a creditor's failure to fill in the blank designated for the rescission deadline." *Johnson v. Chase Manhattan Bank*, 2007 WL 2033833, at *4 (E.D. Pa. July 11, 2007).

In dismissing the *Semar* and *Lafferty* holdings, the First Circuit classified them as "elderly"[8] and stated that

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(Cont'd)
line which is left blank.") *New Maine Nat. Bank v. Gendron*, 780 F.Supp. 52, 57 (D.Me. 1991)("Both the case law and statutory language are clear and undisputed with respect to extension of the three-day rescission period where the expiration date has been omitted from the notice."); *Mayfield v. Vanguard Sav. & Loan Ass'n*, 710 F.Supp. 143, 146 (E.D.Pa. 1989)("[R]escission notices given to plaintiff . . . failed to specify the date upon which the three day rescission period expired. Failure to specify such dates automatically violates the TILA and entitled plaintiff to rescind the loan within the three year rescission period."); *Aquino v. Public Finance Consumer Discount Co.*, 606 F.Supp. 504, 507 (E.D.Pa.1985) ("According to the Board's regulations, creditors are required to provide customers with a notice of their right to rescind that specifies the precise date upon which the three day rescission period expires.") *Armstrong v. Nationwide Mortgage Plan* (*In re Armstrong*), 288 B.R. 404, 414 (Bankr. E.D. Pa. 2003)([N]otices "lack the date of the transaction and the corollary deadline to rescind. This is a clear violation of § 1635. This gave the Debtor 3 years from the date of the loan closing to rescind."); *In re Rodrigues*, 278 B.R. 683, 687 (Bankr. D.R.I. 2002)("[T]he Rodrigueses did not receive completed copies of the Notice of the Right to Cancel . . . Therefore, the borrowers' right of rescission is extended for three years after the date of consummation of the transaction.")

8. App. 6a.

the 1995 TILA amendments showed that "Congress has now leaned against a penalty approach and, perhaps, weakened the present force of the older case law favoring extension of the rescission deadline."[9] This is a fundamental misstatement of the 1995 amendments, which created generous "tolerances and forgivenesses" for lenders and created the "safe harbor"against rescission if the creditor used the Board's model recession notice form. However, Congress was very specific in limiting the "safe harbor" to creditors who "properly completed" the model form notice of rescission.[10] Contrary to the Opinion's conclusion, the 1995 amendments actually strengthened consumer rescission rights in the foreclosure context.[11] Furthermore, Congress was simultaneously creating HOEPA, in which the right of rescission was selected as the remedy of choice to enforce compliance with new statutory requirements and prohibitions.[12] Thus, the 1995 amendments did not indicate a general intent to weaken the right of rescission under TILA.

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9. App. 9a.

10. 15 U.S.C. § 1635(h).

11. 15 U.S.C. § 1635(i).

12. 15 U.S.C. § 1639; Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2190-94 (Subtitle B of Title I, known as the Home Ownership and Equity Protection Act of 1994).

B. The First Circuit Improperly Substituted its Own "Interstitial Lawmaking" for the Federal Reserve Board's Rules

The Supreme Court has consistently held that regulations and commentary issued by the Board with regard to TILA are binding on the federal courts. "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). "Absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation." *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). Thus, "whenever Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 238 (2004), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

The circuit court decision specifically recognized that:

> Regulation Z says what the notice of the right to cancel must clearly and conspicuously disclose; pertinently, the regulation requires that the notice include "[t]he date the rescission period expires." 12 C.F.R. § 226.23(b)(1)(v).

(App. 4a) However, the court of appeals never again references this requirement. Instead, it ignored Regulation Z and impermissibly created a new test to determine the adequacy of a TILA rescission notice: "technical deficiencies do not matter if the borrower receives a notice that *effectively gives him notice as to the final date for rescission* and has the three full days to act." (App. 7a) Nowhere in the TILA, Regulation Z or the Official Commentary is this alternate test espoused.

The circuit court's compliance test is dangerously subjective compared to that created by the Board. Lenders nationwide now rely upon and use the "model form" in compliance with the mandates of 12 C.F.R. § 226.23(b)(1) to protect them from non-disclosure claims. *See,* 15 U.S.C. § 1635(h). Allowing the First Circuit to have an alternate test of whether a notice *effectively* gives a reasonable person the ability to calculate the proper rescission deadline creates confusion and instability for both borrowers and lenders. If this aberrant test stands, the detailed and uniform requirements of the Board's Regulations will be supplanted by the subjective analysis of each trial judge.

By holding that the failure to include the "date the rescission period expires" required by Regulation Z and mandated by the Official Staff Commentary "makes no difference," the First Circuit improperly inserted itself into the role that Congress assigned to the Federal Reserve Board. Rather than defer to the Board's rational interpretation of the TILA and to its expert judgment that consumers need the ***actual date*** that the rescission period expires spelled out in the form, the

First Circuit substituted its own "interstitial lawmaking for that of the Federal Reserve Board." *Milhollin, supra,* at 568, 100 S.Ct. 790. The danger of such interference is best illustrated in the Decision itself:

> The date that Melfi closed on the loan can hardly have been unknown to him and was in fact hand stamped or typed on the form given to him. From that date, *it is easy enough to count three days*; completing the blank avoids only the risk created by the fact that Saturday counts as a business day under Board regulations.

(App. 7a) This is incorrect. Regulation Z requires a "business day" calculation. Because Mr. Melfi's refinance occurred on a Friday, simply counting three ordinary days yields the incorrect deadline to rescind under TILA.

Mondays through Fridays are considered business days in the United States.[13] Thus, Mr. Melfi and any average consumer would have excluded both the Saturday and Sunday following his Friday closing and begun the "business day" count with the following Monday, incorrectly yielding a rescission deadline of Wednesday, April 10. Alternatively, using Federal Rule of Civil Procedure 6, which provides that you *include* Saturdays and Sundays whenever a time period is less than 11 days, the business day count would yield an

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13. A business day is defined as "a day on which banks and major stock exchanges are open, excluding Saturdays and Sundays." *Black's Law Dictionary* (7th ed. 1999).

incorrect deadline of Monday. Only by employing the TILA's particular definition of business day (which includes Saturday but excludes Sunday)[14] would a borrower correctly calculate his rescission deadline as ending at midnight on Tuesday April 11.

This is exactly the type of confusion and uncertainty which the Board sought to avoid when it mandated that the actual "date the rescission period expires" be included in every rescission notice. Indeed, the Fifth Circuit in *Lafferty* stated that "the precise purpose of requiring the creditor to fill in the [rescission expiration] date is to prevent the customer from having to calculate three business days". *Williamson v. W.E. Lafferty*, 698 F.2d 767, 769, n.3 (5th Cir. 1983). Regulation Z's clear and objective requirement that the rescission deadline be spelled out in the notice should be endorsed over the subjective test enunciated by the First Circuit.

C. Consistent Nationwide Enforcement of TILA is at Risk

The danger of inconsistent application of TILA disclosure requirements across jurisdictions is an issue of national importance to both borrowers and lenders, who both desire consistency. One of the goals of TILA was to encourage consistent and fair treatment of borrowers across the nation. *See,* H.R.1040, 90th Cong.,

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14. 12 C.F.R. § 226.2(6). *See, Aubin v. Residential Funding Co.*, 565 F.Supp.2d 392, 397 (D. Conn. 2008)("[i]t would likely surprise the average person (it certainly surprised this judge) to learn that 'Saturday' is included within TILA's definition of a 'business day.")

2d Sess. (1968), reprinted in (1968) U.S.Code Cong. & Ad.News 1962, 1962-2029. "Consistent treatment and certain deterrence are advanced when TILA claims are accorded equal deference in all jurisdictions." *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982).

The uniformity and certainty which Congress sought to provide by delegating to the Board the authority to implement regulations specifying exactly which items must be included in a rescission notice is undermined by the First Circuit's Opinion. Presently, the identical mortgage rescission notice issued by a lender is deemed sufficient in Rhode Island but would be deficient in California; adequate in Maine but inadequate in Texas.

Such inconsistent results cannot stand, especially where many homeowners are attempting to rescind subprime mortgages which failed to comply with the federal TILA's disclosure requirements. Mr. Melfi's loan was a classic predatory loan, with a complex repayment structure, a prepayment penalty, amortized over 40 years but with a $105,000 balloon payment due at year 30. Because "rescission is such a painless remedy under the statute, placing all burdens on the creditor, it acts as an important enforcement tool, insuring creditor compliance with TILA disclosure requirements." *Williams v. Homestake Mortgage Company*, 968 F. 2d 1137, 1140 (11th Cir. 1992). In the current economic climate,[15] consumer protection regulations should not be eviscerated by judicial fiat.

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15. Almost two million foreclosure filings were reported in the first six months of 2009, a nearly 15 percent increase (Cont'd)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Cont'd)

from the first six months of 2008, according to RealtyTrac. This means one in 84 households received a foreclosure filing in the first half of this year. RealtyTrac, *1.9 Million Foreclosure Filings Reported on More Than 1.5 Million U.S. Properties in First Half of '09, http://www.realtytrac.com/contentmanagementrealtytraclibrary.aspx* (last accessed Oct 13, 2009).

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 11, 2009

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 09-1066

JOSEPH MELFI,

Plaintiff, Appellant,

v.

WMC MORTGAGE CORPORATION, Series 2006-WMCZ under the pooling and servicing agreement without recourse; MORGAN STANLEY ABS CAPITAL 1 INC., Asset Backed Pass Through Certificates; DEUTSCHE BANK NATIONAL TRUST COMPANY, N.A., as Trustee of Morgan Stanley ABS Capital 1 Inc.; WELLS FARGO BANK, N.A.; Does 1-5,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

Before
Boudin, Hansen,* And Lipez,
Circuit Judges.

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* Of the Eighth Circuit, sitting by designation.

Appendix A

BOUDIN, *Circuit Judge*. In April 2006, Joseph Melfi refinanced his home mortgage with WMC Mortgage Corporation ("WMC"). At the closing, Melfi received from WMC a notice of his right to rescind the transaction. The notice is required for such a transaction by the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635(a) (2006). Assuming that the notice complies with TILA, a borrower is given three "business days" to rescind the transaction; otherwise, the period is much longer. *Id.* The question in this case is whether the notice given Melfi adequately complied.

The three-day period aims "to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his [or her] home." S.Rep. No. 96-368, at 28 (1979), *reprinted in* 1980 U S.C.C.A.N. 236, 264. Under TILA, the requirements for the notice are established by the Federal Reserve Board ("the Board") in its Regulation Z. 12 C.F.R. § 226.23 (2007). Failure to provide proper notice extends to three years the borrower's deadline to rescind. *Id.* § 226.23(a)(3).

About 20 months after the closing, Melfi attempted to rescind the transaction. The incentives for a borrower to do so may be substantial where a new loan is available, especially if rates have fallen or substantial interest has been paid during the period of the original loan. "When a consumer rescinds a transaction . . . the consumer shall not be liable for any amount, including any finance charge" and "the creditor shall return any money or property that has been given to anyone in connection with the transaction. . . ." 12 C.F.R. 226.23(d)(1), (2).

Melfi argued that the notice of his right to cancel was deficient because it left blank the spaces for the date of the transaction (although the date was stamped on the top right corner of the notice) and the actual deadline to rescind. WMC and co-defendants Deutsche Bank and Wells Fargo (the loan's trustee and servicer, respectively) refused to allow the rescission, and Melfi then brought this action in the federal district court in Rhode Island.

The district court, following our decision in *Palmer v. Champion Mortgage*, 465 F.3d 24 (1st Cir. 2006), asked whether a borrower of average intelligence would be *311 confused by the Notice. *Melfi v. WMC Mortgage Corp.*, No. 08-024ML, 2009 WL 64338, at *1 (D.R.I. Jan. 9, 2009). The court ruled that even if the omissions in the notice were violations, they were at most technical violations that did not give rise to an extended rescission period because the notice was clear and conspicuous despite the omissions, and it dismissed Melfi's complaint. *Id.* at *3.

Melfi now appeals. Our review is *de novo*, accepting all of the well-pleaded facts in the complaint as true and drawing reasonable inferences in favor of Melfi. *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 51 (1st Cir. 2008). We may consider materials incorporated in the complaint (here, the notice Melfi received) and also facts subject to judicial notice. *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 14 (1st Cir. 2003).

Appendix A

TILA provides that "[t]he creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor [here, Melfi] in a transaction subject to this section the rights of the obligor under this section." 15 U.S.C. § 1635(a). Regulation Z says what the notice of the right to cancel must clearly and conspicuously disclose; pertinently, the regulation requires that the notice include "[t]he date the rescission period expires." 12 C.F.R. § 226.23(b)(1)(v).

The Board has created a model form; a creditor must provide either the model form or a "substantially similar notice." 12 C.F.R. § 226.23(b)(2). The use of the model form insulates the creditor from most insufficient disclosure claims. 15 U.S.C. § 1604(b). WMC gave Melfi the model form, but the spaces left for the date of the transaction and the date of the rescission deadline were not filled in. The form Melfi received had the date of the transaction stamped at its top (but it was not so designated) and then read in part:

> You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within **THREE BUSINESS DAYS** from whichever of the following events occurs **LAST:**
>
> (1) The date of the transaction, which is _____; or

(2) The date you receive your Truth in Lending disclosures; or

(3) The date you received this notice of your right to cancel.

. . . .

HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing. . . .

You may use any written statement that is signed and dated by you and states your intention to cancel and/or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of _____ (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

. . . .

Melfi's argument is straightforward. Regulation Z requires in substance the deadline for rescission be provided; one of the three measuring dates-the date of the transaction-was left blank (the other two are described but have no blanks); and therefore the notice was deficient and Melfi has three years to rescind. A number of district court cases, along with two circuit court opinions, support Melfi's position,[1] although one of the circuit cases also involved more serious substantive flaws.

The circuit cases are now elderly and may be in tension with later TILA amendments, but the statements that "technical" violations of TILA are fatal has been echoed in other cases. This circuit took a notably different approach in *Palmer* to determining whether arguable flaws compromised effective disclosure process. *See also Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12, 17 (1st Cir. 2007). Following *Palmer*, district court decisions in this circuit concluded that failing to fill in a blank did not automatically trigger a right to rescind.[2]

---

1. *E.g., Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 702-03 (9th Cir. 1986); *Williamson v. Lafferty*, 698 F.2d 767, 768-69 (5th Cir. 1983); *Johnson v. Chase Manhattan Bank, USA N.A.*, No. 07-526, 2007 WL 2033833, at *3 (E.D.Pa. July 11, 2007); *Reynolds v. D & N Bank*, 792 F. Supp. 1035, 1038 (E.D. Mich. 1992).

2. *Bonney v. Wash. Mut. Bank*, 596 F. Supp. 2d 173 (D. Mass. 2009); *Megitt v. Indymac Bank, F.S.B.*, 547 F. Supp. 2d 56 (D. Mass. 2008); *Carye v. Long Beach Mortgage Co.*, 470 F. Supp. 2d 3 (D. Mass. 2007).

Appendix A

In *Palmer*, the plaintiff received a notice of her right to cancel that followed the Federal Reserve's model form but the form was not received until after the rescission deadline listed on the notice. 465 F.3d at 27. Nonetheless, *Palmer* held that the notice "was crystal clear" because it included (as in the Federal Reserve's model form) the alternative deadline (not given as a date but solely in descriptive form) of three business days following the date the notice was received, so the plaintiff still knew that she had three days to act. *Id.* at 29.

Palmer did not involve the blank date problem. *Palmer*, 465 F.3d at 29. But the principle on which *Palmer* rests is broader than the precise facts: technical deficiencies do not matter if the borrower receives a notice that effectively gives him notice as to the final date for rescission and has the three full days to act. Our test is whether any reasonable person, in reading the form provided in this case, would so understand it. Here, the omitted dates made no difference.

The date that Melfi closed on the loan can hardly have been unknown to him and was in fact hand stamped or typed on the form given to him. From that date, it is easy enough to count three days; completing the blank avoids only the risk created by the fact that Saturday counts as a business day under Board regulations, 12 C.F.R. § 226.2(6), and the borrower might think otherwise. *Lafferty*, 698 F.2d at 769 n. 3 ("[T]he precise purpose of requiring the creditor to fill in the date [of the rescission deadline] is to prevent the customer from having to calculate three business days").

Nor does completing the blank necessarily tell the borrower how long he has to rescind. Where after the closing the borrower is mailed either the notice or certain other required information, the three days runs not from the transaction date but from the last date when the borrower receives the notice and other required documents. Melfi himself says he was given the form on the date of the closing and does not claim that there was any pertinent delay in giving him the other required disclosures. So the blanks in no way misled Melfi in this case.

So the argument for allowing Melfi to extend his deadline from three days to three years depends on this premise: that any flaw or deviation should be penalized automatically in order to deter such errors in the future. If Congress had made such a determination as a matter of policy, a court would respect that determination; possibly, this would also be so if the Board had made the same determination. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Melfi argues at length that we owe such deference to the Board.

The answer is that there is no evidence in TILA or any Board regulation that either Congress or the Board intended to render the form a nullity because of an uncompleted blank in the form or similar flaw where, as here, it could not possibly have caused Melfi to think that he had months in order to rescind. The central purpose of the disclosure-the short notice period for rescission at will-was plain despite the blanks. Melfi's

argument assumes, rather than establishes, that a penalty was intended.

Some cases finding a blank notice form to be grounds for rescission even though harmless were decided under an earlier version of TILA. In 1995, Congress added a new subsection to TILA, titled "Limitation on Rescission Liability." It provided that a borrower could not rescind "solely from the form of written notice used by the creditor . . . if the creditor provided the [borrower] the appropriate form of written notice published and adopted by the Board. . . ." Truth in Lending Act Amendments of 1995, Pub L. No. 104-29, § 5, 109 Stat. 271, 274 (1995) (codified at 15 U.S.C. § 1635(h)).

Read literally, this safe harbor *may* not be available to WMC because, while it used the Board's form of notice, it did not properly fill in the blanks. But the TILA amendments were aimed in general to guard against widespread rescissions for minor violations. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007). To this extent, Congress has now leaned against a penalty approach and, perhaps, weakened the present force of the older case law favoring extension of the rescission deadline.

In any event, in the absence of some direction from Congress or the Board to impose a penalty, we see no policy basis for such a result. Where, as here, the Board's form was used and a reasonable borrower cannot have been misled, allowing a windfall and imposing a penalty serves no purpose and, further, is at odds with the general approach already taken by this court in *Palmer*.

Affirmed.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND DATED JANUARY 9, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 08-024ML

JOSEPH C. MELFI,

Plaintiff

v.

WMC MORTGAGE CORPORATION, Deutsche Bank National Trust Company, N.A., as Trustee of MORGAN STANLEY ABS CAPITAL I INC., Asset Backed Pass Through Certificates Series 2006-WMC2 Under The Pooling and Servicing Agreement Without Recourse, WELLS FARGO BANK and DOES 1-5,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on the objection filed by Joseph C. Melfi ("Melfi"), the Plaintiff, to a Report and Recommendation issued by Magistrate Judge Almond on November 19, 2008. Magistrate Judge Almond recommends that the Defendants' Motion to Dismiss be granted and that the Plaintiff's complaint

be dismissed in its entirety.[1] This Court has reviewed the Report and Recommendation and the Plaintiff's memorandum in support of his objection. Finding no merit in Melfi's contentions, this Court adopts the Report and Recommendation. The Defendants' motion to dismiss the complaint is GRANTED, and the complaint is DISMISSED.

I. Standard of Review

Pursuant to Fed. R. Civ. P. 72(b)(3), this Court must consider *de novo* any part of the magistrate judge's recommended disposition to which a proper objection has been made. A motion to dismiss a complaint is a dispositive motion; therefore, this court reviews *de novo* the issues under objection. Fed. R. Civ. P. 72(b).

II. Background

The basis of this claim arose when Defendant WMC Mortgage Corporation ("WMC") issued Melfi a loan, secured by his home. The closing took place on April 7, 2006, when Melfi signed a note for $190,000 as well as a Truth in Lending disclosure statement. On December 19, 2007 and February 6, 2008, Melfi unsuccessfully attempted to exercise his right to rescind.

---

1. Pursuant to an Order of this Court, the Defendants' Motion to Dismiss has been treated as one for summary judgment under Fed.R.Civ.P. 56, because the record includes facts beyond those alleged in the complaint. *Melfi v. WMC Mortgage Corp.*, C.A. 08-024 (Aug. 20, 2008).

Appendix B

At issue is the sufficiency of the Notice of Right to Cancel ("Notice") received upon closing, which Melfi contends was inadequate because it failed to specify the date of the transaction or the date of the expiration of the rescission period on blank lines provided within the form.[2] Defendants assert that they provided Melfi with a legally sufficient Notice. This Notice is required by the Truth in Lending Act ("TILA"), and it must "clearly and conspicuously" notify the borrower of the right to rescind the loan as well as the method to do so. 15 U.S.C. § 1635(a). If the Notice was insufficient, the rescission period extends to three years, rather than the requisite three days. 12 C.F.R. § 226.23(a)(3).

III. Objection One

Melfi first contends that Magistrate Judge Almond ignored the mandates of Regulation Z, which provides detailed requirements for all credit transactions which involve a security interest in a consumer's principal dwelling. *See* 12 C.F.R. § 226.1 *et seq.* Melfi argues that the Defendants violated the Regulation's requirement that a creditor disclose the expiration date of the rescission period, and that Magistrate Judge Almond failed to defer to the Federal Reserve Board's interpretation of the Truth in Lending Act as required. This Court disagrees.

Magistrate Judge Almond in his Report and Recommendation carefully limned the requirements of

2. The Report and Recommendation contains more detailed facts.

Regulation Z, as well as case law interpreting its requirements, and ultimately found that the Notice issued in the case at hand was sufficiently clear and conspicuous to meet the Regulation's standards. Magistrate Judge Almond found particular significance in the fact that the date of the loan's closing is printed at the top of the Notice. In his Report and Recommendation, Magistrate Judge Almond relied on the First Circuit's decision in *Palmer v. Champion Mortgage*, which utilized an objective standard for the average borrower to determine the sufficiency of notice. *See Palmer v. Champion Mortgage*, 465 F.3d 24, 28 (1st Cir. 2006). Applying that standard to the Notice received by Melfi, Magistrate Judge Almond found it legally sufficient. This Court agrees and finds that the Report and Recommendation appropriately considered the Federal Reserve Board's regulatory interpretation of the Truth in Lending Act.

This Court finds that Magistrate Judge Almond paid appropriate deference to Regulation Z as well as its judicial interpretations. Therefore, Melfi's first objection fails.

IV. Objection Two

Melfi next contends that a majority of case law supports a finding that the failure to include a precise deadline to rescind is actionable. *See Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699 (9th Cir. 1986) (holding that the Notice's omission of the expiration date entitled the plaintiffs to rescission);

Williamson v. Lafferty, 698 F.2d 767 (5th Cir. 1983) (allowing rescission when the Notice omitted the expiration date for the rescission period). Melfi also pointed to the First Circuit's decision in *Santos-Rodriguez v. Doral Mortgage Corp.* for support. *See Santos-Rodriguez*, 485 F.3d 12 (1st Cir. 2007). However, as Magistrate Judge Almond points out, the court in *Santos-Rodriguez* affirmed the dismissal of the consumer's complaint and specifically rejected the "strict liability" view on TILA violations. *Id.* at 16-17 (adopting the clear and conspicuous standard rather than a requirement for hyper-technicality).

Beyond *Santos-Rodriguez*, Magistrate Judge Almond cited a number of decisions which support his Recommendation. In *Carye v. Long Beach Mortgage Co.*, the court considered a Notice identical to the one received by Melfi and found that it would not be confusing to the average borrower. *Carye*, 470 F. Supp. 2d 3, 9 (D. Mass. 2007) ("[D]espite the fact that the Notices failed to include the dates of the transaction, this Court is persuaded as matter of law that the average person would be aware that the rescission period expired three days after receiving the Notices."). Similar facts were present in *Megitt v. Indymac Bank, F.S.B.*, in which the Notice was found legally sufficient when it listed the date of the transaction but omitted the expiration date for the rescission period. *Megitt*, 547 F.Supp.2d 56 (D. Mass. 2008).

The Report and Recommendation's finding that the Notice was legally sufficient is adequately supported by case law. Accordingly, Melfi's second objection fails.

V. Objection Three

Melfi further argues that Magistrate Judge Almond and the post-*Palmer* decisions which he cites have misconstrued *Palmer v. Champion Mortgage*. Melfi contends that "*Palmer* simply stands for the proposition that a Notice [ ] is clear and conspicuous if it complies with the TILA and *contains* the information set forth in the model forms despite the date of it's [*sic*] delivery." Pl.'s Objection to Rep. and Recommendation of Magis. Judge Almond Dismissing Pl.'s Compl. at 12 (Nov. 25, 2008). Melfi argues that the common pervasive flaw is that the courts, and Magistrate Judge Almond, have failed to afford the mandatory deference required for Regulation Z. As discussed above, the Report and Recommendation thoughtfully considers the standards of Regulation Z and finds the Notice at issue legally sufficient pursuant to its requirements. Melfi's third objection fails.

VI. Objection Four

Melfi's final objection argues that Magistrate Judge Almond erred in his Report and Recommendation because substantive violations of Regulation Z are actionable, regardless of their technicality. Melfi contends that Magistrate Judge Almond inappropriately depicts the inadequacies of the Notice received as "hyper-technicalities," and thus excusable.

As noted above, the First Circuit has rejected the strict liability view for TILA violations, citing TILA

amendments which were intended to " 'provide higher tolerance levels for what [Congress] viewed as honest mistakes in carrying out disclosure obligations.' " *Santos-Rodriguez*, 485 F.3d at 17 (quoting *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007)). In this case, the Notice was clear and conspicuous despite the information omitted, because the hypothetical average consumer would not have been confused by the Notice. The Notice, therefore, did not violate TILA.

VII. Conclusion

Accordingly, the Defendants' Motion to Dismiss, considered as a Motion for Summary Judgment, is GRANTED.

SO ORDERED.

s/ Mary M. Lisi
Mary M. Lisi
Chief United States District Judge
January 9, 2009

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND DATED NOVEMBER 19, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

C.A. No. 08-024ML

JOSEPH C. MELFI

v.

WMC MORTGAGE CORPORATION, DEUTSCHE BANK NATIONAL TRUST COMPANY, N.A., as Trustee of MORGAN STANLEY ABS CAPITAL I INC., Asset Backed Pass Through Certificates Series 2006-WMC2 Under the Pooling and Servicing Agreement Without Recourse, WELLS FARGO BANK and DOES 1-5

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge.

This matter is before the Court on Defendants' Motion to Dismiss (Document No. 11) which, per Order of Chief District Judge Mary Lisi (Document No. 23) will be treated as a Motion for Summary Judgment because the record includes facts beyond those alleged in the Complaint. Rule 12(d), Fed. R. Civ. P. Defendants who have moved to dismiss are Wells Fargo Bank N.A. and Deutsche Bank National Trust Company, N.A., as

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Trustee of Morgan Stanley ABS Capital I, Inc., Asset Backed Pass Through Certificates Series 2006-WMC2 Under the Pooling and Service Agreement Without Recourse (collectively the "Defendants"). Plaintiff's Complaint alleges that Defendants provided him with insufficient and non-complying documentation when he borrowed money from them in 2006. The documentation in question, attached to Plaintiff's Complaint as Exhibit 1, is required by the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667. The disputed document is the Notice of Right to Cancel (the "Notice"), which provides a borrower with a three-day window in which to rescind a loan, pursuant to 15 U.S.C. § 1635(a). Defendants assert that the Notice is legally sufficient as a matter of law, and ask that Plaintiff's Complaint be dismissed. For the reasons explained below, this Court recommends that the Complaint be DISMISSED in its entirety.

Travel of the Case

The dispute between these parties was the subject of an earlier Report and Recommendation issued on July 11, 2008. (Document No. 19). At that time, Defendants asserted that they provided Plaintiff with two copies of a fully completed and signed rescission Notice. (Document No. 2, Counterclaim ¶ 4). Defendants attached this completed version of the Notice to their Answer and Counterclaim. (Documents No. 2-3 and 2-4). Plaintiff disputed the authenticity of the Notice, maintaining that the Notice he actually received had several blanks that had not been filled in. (Document

No. 5 at ¶ 2). In their Motion to Dismiss, Defendants urged this Court to evaluate the legal propriety of the version of the Notice submitted to the Court by Plaintiff. (Document No. 11). However, given the factual dispute as to whether or not Plaintiff had actually received a completed Notice, this Court recommended the denial of Defendants' Motion to Dismiss, along with a limited period of discovery to develop the factual record. (Document No. 19).

Both sides objected to the Report and Recommendation. (Documents No. 20 and 21). In their Objection, Defendants argued that, for purposes of ruling on their Motion to Dismiss, the Court should confine its analysis to Plaintiff's version of the Notice. (Document No. 20 at p. 2, n2). Plaintiff concurred. (Document No. 21 at p. 1). Consequently, Chief Judge Lisi again referred the matter to this Court with the direction that Defendants' Motion to Dismiss be treated as one for Summary Judgment. Given that the parties have effectively stipulated to the material facts, this matter is now ready for review and recommendation.

Standard of Review

A party shall be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the Court

must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Cadle Co. v. Hayes,* 116 F.3d 957, 959 (1st Cir. 1997).

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver "an absence of evidence to support the nonmoving party's case." *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 48 (1st Cir. 1990) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)). Once the moving party meets this burden, the burden falls upon the nonmoving party, who must oppose the motion by presenting facts that show a genuine "trialworthy issue remains." *Cadle,* 116 F.3d at 960 (*citing Nat'l Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 735 (1st Cir. 1995); *Maldonado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994)). An issue of fact is "genuine" if it "may reasonably be resolved in favor of either party." *Id.* (*citing Maldonado-Denis,* 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party must present affirmative evidence to rebut the motion. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-257, 106 S. Ct. 2505, 2514-2515, 91 L. Ed. 2d 202 (1986). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, [or] unsupported speculation." *Medina-Munoz v. R.J.*

Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Moreover, the "evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." *Id. (quoting Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trialworthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993) *(citing Anderson*, 477 U.S. at 249).

Factual Background

In analyzing the merits of Defendants' Motion, the Court will rely upon Plaintiff's Supplemental Memorandum which outlines the factual background of this dispute. (Document No. 24 at ¶¶ 1-3). Plaintiff obtained a loan from WMC Mortgage Corporation[1] to allow him to consolidate a number of personal and household debts. The loan was secured by a mortgage on Plaintiff's home. The closing on the loan took place on April 7, 2006, at which time Plaintiff signed a note in the principal amount of $190,000.00. Plaintiff also signed a Truth in Lending disclosure statement, and received the copies of the Notice attached to his Complaint as Exhibit 1. Plaintiff also asserts that:

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1. WMC Mortgage Corporation is Defendants' predecessor-in-interest.

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> On or about December 19, 2007 and February 6, 2008, respectively, Plaintiff exercised his extended right to rescind the loan against WMC and the assignee under 15 U.S.C. § 1641(c) for violations of the TILA.

(Document No. 24 at ¶ 4).

A. Borrower's Right to Rescind

As this Court explained in the earlier Report and Recommendation (Document No. 19), TILA provides a borrower with the right to rescind a loan that is secured by his or her principal dwelling within three business days of the loan's consummation — that is, three days after the closing of the loan or three days after the delivery to the borrower of certain material disclosures, whichever is later. 15 U.S.C. § 1635(a). TILA requires that the lender must "clearly and conspicuously" notify the borrower of the right to rescind the loan and of the method that right can be exercised. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(b)(1). The consequence of the lender's failure to provide this notice to the borrower is that the right to rescind the loan is extended from three days to three years. 12 C.F.R. § 226.23(a)(3). Not only is the omission of the notice a violation of TILA, but "a misleading disclosure" may also violate TILA's notice provisions. *Barnes v. Fleet Nat'l Bank*, 370 F.3d 164, 174 (1st Cir. 2004).

While TILA outlines the fundamentals of the "clear and conspicuous disclosure" requirement, the Code of

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Federal Regulations provides more detail in "Regulation Z," which applies to all credit transactions "in which a security interest is or will be retained or acquired in a consumer's principal dwelling." 12 C.F.R. § 226.23(a)(1). Section (b) of Regulation Z states:

> (1) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind . . . The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:
>
> (i) The retention or acquisition of a security interest in the consumer's principal dwelling.
>
> (ii) The consumer's right to rescind the transaction.
>
> (iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.
>
> (iv) The effects of rescission, as described in paragraph (d) of this section.
>
> (v) The date the rescission period expires.
>
> (2) Proper form of notice. To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

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There is no dispute between the parties that the Notice provided to Plaintiff was the "proper form" as described in part (2) above.

The Notice that Plaintiff received at the closing on April 7, 2006, is labeled across the top: "Notice of Right to Cancel." (Document No. 1-2). The heading includes the lender's name, address, the date of the closing, the loan number and type and the borrower's name and address. The Notice includes:

> You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within **THREE BUSINESS DAYS** from whichever of the following events occurs **LAST**:
>
> (1) The date of the transaction, which is _____; or
>
> (2) The date you receive your Truth in Lending disclosures; or
>
> (3) The date you received this notice of your right to cancel.

(Document No. 1-2).

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The next two paragraphs describe the ramifications of rescission. The form then explains how to cancel:

> If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of _____ (or MIDNIGIIT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

Id. The bottom of the form is an acknowledgment of receipt of two copies of the Notice, with a blank signature line for the borrower to sign and date the form. This line, as well as the other blank lines indicated above were left incomplete on the instant Notice.

B. Plaintiff's Attempts to Rescind the Loan

Approximately twenty months after the closing, on December 19, 2007, Plaintiff sent a notice of rescission to WMC Mortgage Corporation and to Morgan Stanley ABS Capital I Inc. (Document No. 1, ¶ 7). This request was ignored. *Id.* Plaintiff filed his Complaint on January 17, 2008. Subsequent to that filing, Plaintiff again attempted to rescind the loan on February 6, 2008. (Document No. 24, ¶ 4). Presumably, this rescission notice was sent to WMC Mortgage Corporation's assignee, Defendants herein.

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Discussion

Plaintiff alleges that the Notice supplied to him was incomplete and defective under TILA because it did not include the date of the transaction or the date of the expiration of the rescission period. Accordingly, he asserts that the period of time in which he is able to rescind the loan must be extended to three years. Defendants seek dismissal of the Complaint, arguing that the Notice serves the purpose of clearly informing Plaintiff of his right to rescind the loan, as well as informing him of how to go about the rescission. (Document No. 20).

A. *Palmer v. Champion Mortgage*

The First Circuit recently addressed a somewhat similar factual scenario in *Palmer v. Champion Mortgage*, 465 F.3d 24 (1st Cir. 2006), which also involved a non-purchase money mortgage covered by TILA. The notice at issue in *Palmer* was worded much the same as Plaintiff's Notice in this case, but the blanks were filled in with the date of the transaction, as well as the final expiration date, three business days from the closing. However, the notice in *Palmer* was not received by the borrower until several days after the final expiration date. Approximately a year and a half later, the borrower attempted to rescind the loan. When the lender failed to comply, the borrower sued, alleging that her notice violated TILA because its arrival by mail after the stated final date for rescission had expired was confusing. In

affirming the District Court's dismissal, the First Circuit ruled that the notice was neither confusing nor defective. *Id.* at 28.

In reaching this conclusion, the First Circuit relied upon "the sound tenet that courts must evaluate the adequacy of TILA disclosures from the vantage point of a hypothetical average consumer — a consumer who is neither particularly sophisticated nor particularly dense." *Id.* at 28. Thus, the question was not whether the borrower was truly confused by her Notice, but whether a borrower of average intelligence would be confused by the Notice. The First Circuit noted further that the language of the Notice tracked the language of Regulation Z's model form, which was "at the very least, prima facie evidence of the adequacy of the disclosure." *Id.* at 29. The Court continued,

> Holding all parties to the plain language of disclosures aids the due enforcement of the statutory requirements by ensuring that any consumer subject to a misleading disclosure may bring suit against the creditor. . . . The flip side of the coin, of course, is that any creditor who uses plain and legally sufficient language ought to be held harmless.

Id. at 29.

The First Circuit followed its decision in *Palmer* with *Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12 (1st Cir. 2007). Two sets of plaintiffs in *Santos-Rodriguez*

refinanced their mortgages through the same lender and received identical versions of the Notice of Right to Cancel form. *Id.* at 14. A year after closing these transactions, both sets of plaintiffs tried unsuccessfully to rescind their loans. Plaintiffs argued that the lender had provided them with a model disclosure form designed for general transactions, rather than the model form designed for same-lender refinancing transactions. *Id.* at 15. Plaintiffs argued further that the form they received was misleading as to their rescission rights. *Id.* at 16.

Pointing out that "the TILA's clear and conspicuous standard is less demanding than a requirement of perfect notice," the First Circuit rejected the "strict liability" view endorsed by some other circuits that have held that even a technical error constitutes a TILA violation. *Id.* at 16, n6. The Court buttressed its argument by citing amendments made by Congress to TILA in 1995, "intended by Congress to 'provide higher tolerance levels for what it viewed as honest mistakes in carrying out disclosure obligations.' " *Id.* at 17 *(quoting McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007)). The Court, affirming the dismissal of the complaint, held that the notices provided to plaintiffs clearly and conspicuously fulfilled the lender's disclosure obligation. *Id.* at 17.

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B. *Carye v. Long Beach Mortgage* and *Megitt v. Indymac Bank, F.S.B.*

The United States District Court for the District of Massachusetts recently rendered decisions in two similar TILA cases. The first was *Carye v. Long Beach Mortgage Co.*, 470 F. Supp. 2d 3 (D. Mass. 2007). The borrower in *Carye* received disclosure notices identical to those received by Plaintiff in this case. Not only were the forms the same, but the notices also left the date of the transaction and the date of the final expiration for rescission blank. *Id.* at 9. Judge Young concluded that the notice would not be confusing to the average borrower and reasoned that:

> In *Palmer*, 465 F.3d at 28-29, the First Circuit held that a notice which failed to include a date certain for rescission was nevertheless clear and conspicuous because it contained an alternative provision providing for a three-day rescission period from the date of the receipt of the notice. Similarly, in this case, despite the fact that the Notices failed to include the dates of the transaction, this Court is persuaded as matter of law that the average person would be aware that the rescission period expired three days after receiving the Notices.

Id. at 9.

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Earlier this year, in *Megitt v. Indymac Bank, F.S.B.*, 547 F. Supp. 2d 56 (D. Mass. 2008), Judge Ponsor accepted a notice with the date of the transaction filled in, but the expiration date omitted. *Id.* at 57. Describing the omissions as "at most, unactionable technical violations," the Court stated:

> The import of the First Circuit's *Palmer* decision with regard to the purely technical omission in the document embodying the notice makes the ruling here compelling and inevitable. Judge Young's *Carye* decision sensibly applies *Palmer* to precisely the facts underlying this case.

Id. at 57.

This Court also believes that the Notice supplied to Plaintiff in the present case is sufficiently clear and conspicuous to provide the TILA-required information to a borrower of average intelligence and sophistication. The Notice is clearly directed at Plaintiff, containing his name, address and loan number. Significantly, the actual date of the loan's closing is printed at the top of the Notice, though not repeated on the blank line provided for the date of the transaction. The average borrower, having attended the closing and seeing the date printed at the top of the form, would understand that this is the date of the transaction and that he has only a three-day period to rescind the loan.

The final expiration date is "MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above." (Document No. 1-2). This date was also omitted on Plaintiff's form. But this date is always fully contingent on a variety of unavoidably uncertain factors, such as when the borrower actually receives the Notice. This uncertainty was illustrated by the facts of *Palmer*, where the date had been dutifully filled in by the lender, but the Notice went astray in the corporate mailroom or the post office and was not delivered to the borrower until several days after the final expiration date. The delay of receipt of the Notice in *Palmer* rendered the final expiration date inaccurate, but, nonetheless, was clear enough to notify the borrower of her rights. Likewise, Plaintiff herein could have looked at a calendar and counted the three days from the loan's closing, or the receipt of his Truth in Lending disclosures, or the receipt of his Notice of Right to Cancel, and determined his rescission period.

C. *Bonney v. Washington Mutual Bank*

Plaintiff relies heavily on the Report and Recommendation of Magistrate Judge Neiman in *Bonney v. Washington Mut. Bank*, Case No. 3:08-CV-30087-MAP (D. Mass. July 30, 2008). The lender's objection to Judge Neiman's Report and Recommendation is presently pending before District Judge Ponsor.

In *Bonney*, the borrower received a notice of right to cancel which, similar to this case, did not include dates

on the blank lines for transaction date and rescission deadline. Although the facts in *Bonney* are arguably analogous to this case, this Court declines to follow *Bonney* for two primary reasons. First, the Report and Recommendation in *Bonney* is subject to a pending objection and conflicts with Judge Young's decision in *Carye* discussed above. This Court finds Judge Young's reasoning in *Carye* to be persuasive and consistent with existing First Circuit precedent.

Second, the factual record in this case is distinct from that in *Bonney*. In *Bonney*, Judge Neiman recognized that the borrower "may well have been in a position to know the date of the transaction." (Report and Recommendation at p. 7). However, he specifically noted the absence of facts pled to "establish the omitted transaction date as a matter of law. . . ." *Id.* Here, the Notice in question is dated April 7, 2006, and Plaintiff stipulates in his Supplemental Memorandum that the loan transaction took place on April 7, 2006 and that "on April 7, 2006 [he] received copies of his Notice of Right to Cancel in the form of *Exhibit 1* attached to the Amended Complaint." (Document No. 24 at p. 2). Thus, *Bonney* is factually distinct from this case.

D. *Reynolds v. E-Loan, Inc.*

On November 14, 2008, District Judge Woodlock of the District of Massachusetts also weighed in on this TILA issue. See *Reynolds v. E-Loan, Inc.*, C.A. No. 07-cv-11862-DPW, Memorandum and Order (D. Mass. Nov. 14, 2008). In *Reynolds*, Judge Woodlock denied the

lender's Motion to Dismiss the borrower's TILA claim challenging the adequacy of a Notice of Right to Cancel. As in this case, there were two blank lines in the Notice for dates to be inserted which were left blank on the copies provided to the borrower.

In finding a TILA violation, Judge Woodlock reasoned that it was not "the mere failure of the [borrower] to fill in every blank on the disclosure forms that rendered [them] inadequate." *Reynolds*, Memorandum and Order at p. 17. Rather, he relied upon the fact that "the notice failed to provide sufficient information for the average consumer to determine the applicable rescission deadline readily by reference to the three enumerated events. . . ." *Id.* at pp. 17-18. In *Reynolds*, the Notice's three enumerated events were (1) the "opening date" of your account; (2) the date of receipt of TILA disclosures; and (3) the date of receipt of the Notice of Right to Cancel. Judge Woodlock concluded that since the meaning of "the opening date of the account" would not be readily apparent to the average consumer, then "they could not reasonably be expected to count forward three business days from an unknown starting point." *Id.* at pp. 15-16.

This aspect of Judge Woodlock's rationale is critical and makes *Reynolds* distinguishable from this case. As noted above, the first enumerated event in the Notice in this case is "the date of the transaction" not the "opening date of the account." In *dicta*, Judge Woodlock

indicated that this would be a substantive distinction. He stated:

> I note that a different result may be appropriate where the first enumerated event in a disclosure notice is "the date of the transaction," as it was in *Palmer*. I construe that phrase to refer to the date of the loan closing, an event for which the consumer will necessarily be present, either in person or through a designated agent. In this respect, the "transaction date" is analogous to the date of the consumer's receipt of the TILA disclosures or of the Notice of Right to Cancel. For each of those events, the average consumer will either have personal knowledge of the correct date or could easily discover it. The same is not true for "the opening date of the account."

Id. at pp. 16-17. I agree with Judge Woodlock's reasoning and thus conclude that the holding in *Reynolds* is limited to its specific facts and does not support a finding in favor of Plaintiff in this case.

E. The Meaning of Business Days

Plaintiff directs the Court's attention to the fact that Regulation Z defines the term "business day" to include Saturdays, and argues that this would be unexpected and confusing to the average consumer. 12 C.F.R. 226.2(a)(6).[2]

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2. This argument was persuasive for the Court in *Aubin v. Residential Funding Co., LLC*, 565 F. Supp. 2d 392, 397 (D. Conn. 2008).

This argument is irrelevant to the present case. Had Plaintiff tried to rescind his loan on a Monday, following a Wednesday closing date, and had then discovered that his rescission rights had expired at midnight the previous Saturday, the Court's recommendation herein might be different. But the inclusion of Saturday as a business day, *vel non*, played no role in Plaintiff's decision to try to rescind his loan almost *two years* after his receipt of the disclosure Notice.

Conclusion

For these reasons, this Court recommends that Defendants' Motion to Dismiss (Document No. 11) be GRANTED and Plaintiff's Amended Complaint be DISMISSED in its entirety.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within (10) days of its receipt. *See* Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. *See United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
November 19, 2008

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 22, 2009

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1066

JOSEPH C MELFI,

Plaintiff - Appellant

v.

WMC MORTGAGE CORPORATION, Series 2006-WMCZ under the pooling and servicing agreement without recourse; MORGAN STANLEY ABS CAPITAL 1 INC., Asset Backed Pass Through Certificates; DEUTSCHE BANK NATIONAL TRUST COMPANY, N.A., as Trustee of Morgan Stanley ABS Capital 1 Inc.; WELLS FARGO BANK, N.A.; DOES 1-5,

Defendants - Appellees

Appendix D

Before

Lynch, *Chief Judge*,
Torruella, Boudin, Hansen*,
Lipez, Howard *Circuit Judges*.

ORDER OF COURT

Entered: **July 22, 2009**

Attorney Stuart T. Rosenthal's motion for leave to enter an appearance is allowed and the amicus brief of National Consumer Law Center is accepted for filing. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

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* Of the U.S. Court of Appeals for the Eighth Circuit sitting by designation.